1-30-2012

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In this article, Gerzog discusses *Estate of Olivo*, in which the Tax Court determined the deductibility under section 2053 of a claim against the decedent's estate for eldercare services provided by a family member.

Combine the boomer generation with an economic downturn and you get middle-aged children living with their wealthy, aged parents. If children tend to their parents' needs, are they performing those services gratuitously, or is there an oral agreement to provide for them in the parents' wills? When a parent dies, is the estate entitled to a section 2053 deduction for a claim against the estate? Those questions were some of the issues decided in *Estate of Olivo*.[1]

The Olivos had four children who survived them: Anthony, Matthew, Marcia, and Emila.[2] Anthony is an attorney who received an LLM in taxation from New York University in 1979. He practiced law in New Jersey law firms from 1976 to 1988, when he opened his own office. By the mid-1990s, when he began to assist his parents, his firm had started to fail.[3] For the nine years preceding his mother's death on April 26, 2003,[4] Anthony lived with his parents and cared for them.[5]

The Olivos had serious health problems. The father had diabetes and congestive heart failure and died on September 21, 1995.[6] The mother, the decedent in the case, had diabetes, obesity, and paralysis (legs), and needed assistance with daily living activities. She lacked mobility, the ability to bathe and dress herself, and was incontinent. Beginning in 1999 her diabetes progressed to require insulin injections and related blood testing.[7] She developed hyperparathyroidism, hyperthyroidism, hypertension, osteoporosis, and chronic deep vein thrombosis, and she was hospitalized periodically in the 10 years before her death.[8]

Anthony's care of his mother was extensive, and that workload adversely affected his health.[9] He also performed legal work for his parents. In 1995 he prepared his father's durable power of attorney[10]; in 1996 he did the same for his mother.[11] After his mother's death, Anthony prepared an inventory of the estate, filed an estate tax return in 2004, and became the estate's administrator.[12]

On the decedent's estate tax return, Anthony claimed the following deductions: $44,200 (administrator's commission); $50,000 (estimated attorney fees); $5,000 (estimated accountant's fees); and $1.24 million (debt owed Anthony under a purported compensation agreement with the decedent). In 2006, Anthony paid $44,200 to himself (administrator's commission), and between 2004 and 2008, he paid himself $55,400 (attorney fees and litigation expenses). The estate has not paid Anthony anything for the alleged debt, and the probate court has not approved any of the above payments to Anthony and has not closed the estate.[13]

Because the only evidence the estate presented was Anthony's testimony, the Tax Court held that the estate had not sufficiently substantiated the deductions under section 7491(a) to shift the burden of proof to the government for any factual issue.[14]

The court first addressed the deduction of the alleged debt for services between Anthony and the

[1] *Estate of Olivo v. Commissioner*, T.C. Memo. 2011-163, *Doc 2011-15072*, *2011 TNT 133-9*.
[2] *Id.* at 2.
[3] *Id.* at 3.
[4] *Id.* at 7.
[5] *Id.* at 2.
[6] *Id.* at 3.
[7] *Id.* at 4-5.
[8] *Id.* at 5.
[9] *Id.* at 2-6.
[10] *Id.* at 3.
[11] *Id.* at 4.
[12] *Id.* at 6-7. Because of a conflict with one of his sisters, it took more than a year for Anthony to be appointed administrator. *Id.* at 6.
[13] *Id.* at 7.
[14] *Id.* at 8-9.

decedent's estate. According to Anthony's testimony, his mother offered to pay him $200 a day for his elder care services to her, but because he was concerned about her having enough money, he told her that instead of her paying him currently he would collect from her estate. Because of that delay and because of the complexity of computing interest on that amount, she agreed to double the $200 daily amount. Anthony's testimony was the only evidence submitted on this issue. He claimed that he was so distracted by daily caretaking that he "was not thinking like a lawyer during that time."[15]

Under New Jersey law, the court explained, proving the existence of an oral promise requires clear and convincing evidence. Even under the less stringent preponderance of evidence standard that usually applies in the Tax Court, the court found Anthony's testimony of an agreement was "highly questionable," and his assertion that he was unable to act like a lawyer undermined by the facts, including that he had prepared two powers of attorney during that time.[16]

The Tax Court said:

> Given Mr. Olivo's training and experience as an attorney, given how contentious the probating of his father's estate had been, given the apparent animosity between Mr. Olivo and Ms. Glaes [one of Anthony's sisters], and given Mr. Olivo's vested interest in ensuring that he would receive compensation from decedent pursuant to the alleged agreement, we find it difficult to believe that he would not have reduced the alleged agreement to writing or at least have some corroborating evidence beyond his self-serving testimony.[17]

Therefore, the court held that the estate could not deduct Anthony's claim for services he provided under the alleged agreement.[18]

Alternatively, the estate made a *quantum meruit* argument for some recovery, wherein a plaintiff who has performed services may obtain their reasonable value. Quoting a New Jersey Supreme Court case, the Tax Court outlined the four requirements that case law has established for a successful claim under this theory:

> (1) the performance of services in good faith, (2) the acceptance of the services by the person to whom they are rendered, (3) an expectation of compensation therefor, and (4) the reasonable value of the services.[19]

Under New Jersey law, when a family member provides care for another family member in the same household, there is a presumption that the services constitute gifts.[20] Given this presumption and too little evidence to overcome it,[21] the court held that the estate was not entitled to deduct the value of Anthony's caretaking services to the decedent under a *quantum meruit* or quasi-contract theory.[22]

The court then considered the deductibility of the administrator's commission paid to Anthony after the filing of the estate tax return. The applicable regulation[23] provides for the deductibility of those expenses at the final audit of the estate tax return if there is reasonable certainty that the claims will be paid, the amount is within the limitations allowable in the jurisdiction administering the estate, and the amount represents the customarily allowed payments of "estates of similar size and character" in that jurisdiction.[24]

The IRS argued that the commission was not deductible because New Jersey law mandates that commissions be approved by the probate court. However, the Tax Court cited a statutory amendment that explained approval is not required. The court decided it would allow the deduction to the extent provided in the statutory formula, unless the estate does not actually pay that additional amount to Anthony.[25]

Finally, the court considered the deductibility of the estate's payments of attorney fees actually made to Anthony.[26] A deduction for reasonable attorney fees is allowed for amounts paid to contest the estate's deficiency. The IRS did not challenge a

[15]*Id.* at 10.
[16]*Id.* at 11-12.
[17]*Id.* at 12.
[18]*Id.* at 12-13.

[19]*Id.* at 13, citing *Starkey, Kelly, Blaney & White v. Estate of Nicolaysen*, 796 A.2d 238, 242-243 (N.J. 2002), which cited *Longo v. Shore & Reich Ltd.*, 25 F.3d 94, 98 (2d Cir. 1994).
[20]*Id.* at 14.
[21]Anthony provided care for his parents from 1994 to 1998, which all parties accede was gratuitous. Anthony's testimony was the only evidence presented of an alleged compensation agreement between the decedent and him. Several facts indicated a lack of an agreement: no payments were ever made to Anthony for his eldercare services, the probate court did not authorize any payments, and Anthony had not instituted a claim against the estate to recover any payments. *Id.* at 15.
[22]*Id.*
[23]Reg. section 20.2053-3(b)(1), applicable to decedents dying before October 20, 2009.
[24]*Estate of Olivo* at 16.
[25]*Id.* at 18. The court imposed those limitations unless the parties agree otherwise.
[26]Although the fees were described as $50,000 in attorney fees and $5,000 in accountant's fees, Anthony testified that the actual payments were $55,400 for legal fees. *Id.* at 19.

deduction for those expenses. However, it contended that the $55,000 claimed on the estate's return was not deductible because it was not substantiated.

New Jersey law allows an attorney-administrator to recover reasonable attorney fees for additional legal services performed for the estate. However, the state requires the attorney to bear the burden of proof in substantiating those legal services and fees. The court acknowledged that Anthony had ''filed the estate's tax return, handled the IRS examination on behalf of the estate, and filed the estate's original petition with this Court.''[27] Anthony testified that $600 of those claimed attorney fees included $300 for a home appraisal, a $200 surrogate's fee, and $100 in filing fees. Anthony testified that the remaining amount claimed represented an estimate of hours he worked at $150 per hour. With the lack of specificity about the claimed services, the court declined to allow a deduction for fees beyond the $600 above, plus the legal fees stemming from contesting the estate's deficiency in the Tax Court.[28]

Estate of Wilson

In *Wilson*,[29] two brothers who were distant relatives of the decedent's predeceased husband consecutively[30] performed services for the decedent, who was elderly and suffered from severe diabetes and its consequences (blindness and leg amputation). The brothers provided the following services to her: ''companionship, secretarial work, chauffeuring, reading to her, reviewing and paying bills, and taking her to medical and dental appointments.'' They were employed full time elsewhere, but worked mornings for her.[31]

When she died, the decedent left $100,000 to Daniel in her will.[32] On July 22, 1993, alleging an oral contract to leave him one-third of her estate in return for his personal and financial services, Daniel sued her estate. After two years of litigation, the parties agreed to mediation and the executors agreed to pay him $550,000 plus the $100,000 specific bequest provided in the decedent's will. The recovery was treated as compensation, for which the estate issued him a Form 1099.[33]

Approximately 14 months after the decedent's death, David sued the estate, alleging an oral contract identical to Daniel's.[34] After two years of this litigation, the jury found that an oral agreement did exist. The jury valued the services at $75,000 (without interest). But that finding did not limit David's recovery. The parties reached a structured settlement in the amount of $400,000; without that agreement, David's recovery would have been approximately $1.5 million plus $3,750, the *quantum meruit* portion relating to the decedent's real estate.

The IRS contended that the estate was entitled to a $75,000 deduction for each payment to the brothers, rather than a deduction for the full amounts paid to them, because the jury had valued David's services at $75,000.[35]

The court disagreed and held for the estate. The court held that the value of the agreement had to be determined as of 1976, the date of the promise to provide services for the duration of the decedent's life and for the value of one-third of decedent's estate at that time.[36] Neither party produced evidence about either of those values. Both amounts were subject to multiple contingencies.[37] Despite these difficulties, because the brothers were not related to the decedent and because of the brothers' litigation and arm's-length resolution, the court found that their agreement was ''based on adequate and full consideration in money's worth and not intended as a substitute for a testamentary disposition.''[38]

Analysis and Conclusion

Because it would be all too easy to convert a taxable bequest to a family member into a deductible claim for services,[39] the statute requires that a claim be bona fide and for full and adequate consideration in money or money's worth.[40] In addition, to be deductible, the claim must be allowable under local law. In *Wilson*, unlike in *Olivo*, there was evidence of an agreement for services (decedent's first will leaving one-third of her estate to David), the agreement was between nonrelatives

[27]*Id.* at 20.
[28]*Id.* at 22.
[29]*Estate of Wilson v. Commissioner*, T.C. Memo. 98-309, *Doc 98-26384*, *98 TNT 164-9*.
[30]David provided services from 1976 until 1984, and his brother Daniel provided services from 1984 until the decedent's death on October 3, 1992. *Id.* at 2-3.
[31]*Id.* at 3.
[32]*Id.* at 2. The decedent left most of her property to her daughter.
[33]*Id.* at 6-7.
[34]The decedent's 1984 will left David that portion of her estate, but she changed her will after a disagreement with him. *Id.* at 2 and 4.
[35]*Id.* at 7, n.2.
[36]*Id.* at 10.
[37]Unknowable were her ''condition and longevity,'' as well as her financial needs and market fluctuations in asset values, which could diminish the value of her estate. *Id.* at 11.
[38]*Id.* The court aligned both brothers' claims despite the differences in settlement amounts, which the court stated was probably due to the uncertainties of litigation. *Id.* at 12.
[39]*United States v. Stapf*, 375 U.S. 118 (1963). *See* Joseph M. Dodge, Wendy C. Gerzog, and Bridget J. Crawford, *Federal Taxation of Gratuitous Transfers: Law and Planning* 158 (2011).
[40]Section 2053(c)(1)(A).

who were not the natural objects of the decedent's bounty, and both service providers engaged the estate in litigation and settlement like unrelated third parties.

In most case law on this issue involving close relatives, the estate rarely wins because the provider of services seldom can show that there was a compensation agreement when no money had been exchanged between the provider and the decedent before the decedent's death and no income or payroll taxes on the alleged compensation had been paid. Moreover, many cases rest on presumptions under state law, which, like New Jersey law in *Olivo*, often presumes services provided to family members to be gratuitous. It is clear that family members who reside with their aged relatives perform arduous and needed services. Whether states should consider an exception to those presumptions for family members who provide eldercare, or whether an exception would open the floodgates to specious claims is debatable. In the meantime, caregivers should obtain written, signed compensation agreements detailing the services to be provided for an elderly family member and the amount of reasonable compensation that is payable either currently or at the decedent's death.

CORRECTION

Table 2 of Bruce Bartlett's column, ''The Fiscal Effects of the Federal Reserve,'' *Tax Notes*, Jan. 23, 2012, p. 471, had incorrect data; the corrected table appears below.

Tax Notes regrets the error.

Table 2. Federal Reserve Deposits as a Share of Corporate Tax Receipts

Calendar Year	Federal Reserve	Corporate Taxes	Percentage
2010	79.3	329.6	24.1
2009	47.4	201.7	23.5
2008	31.7	233.7	13.6
2007	34.6	362.8	9.5
2006	29.1	395.0	7.4
2005	21.5	341.0	6.3

Source: Bureau of Economic Analysis, NIPA Table 3.2.